Supreme Court, U.S.
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No. 93-1101

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ANN BRUNET and DENISE SACHS,
on behalf of themselves and the class they represent,
Petitioners,

and

GUY E. TUCKER, JAMES T. MEYER,
STUART J. TUDOR, and JOSEPH S. HILLEARY,
on behalf of themselves and the class they represent,
Respondents,

v.

CITY OF COLUMBUS, OHIO, COLUMBUS
CIVIL SERVICE COMMISSION, DANA RINEHART,
ALPHONSE MONTGOMERY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION OF CITY OF COLUMBUS, et al.

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STATEMENT OF THE CASE

Petitioners filed the original action in this case in 1984 alleging that the City's entry-level firefighter examination illegally discriminated against them on the basis of gender in violation of both 42 U.S.C. § 2000e and 42 U.S.C. § 1983.

The City had administered a two part examination that consisted of a cognitive ability test (CAT) and physical capability test (PCT). Following a court trial in 1986, the District Court judge found that the City had not engaged in intentional discrimination under 42 U.S.C. § 1983, but that the PCT violated Title VII due to its adverse impact against women and the City's failure to establish that all components of the PCT were job related. *Brunet v. Columbus,* 642 F.Supp. 1214 (S.D. Ohio 1986), *appeal dismissed as moot*, 826 F.2d 1062 (6th Cir. 1987), *cert. denied* 485 U.S. 1034 (1988) (hereinafter *Brunet I*).

During this litigation five firefighter classes were delayed. The trial court required an extensive, expensive study to be completed by the City to comply with its orders and the City's charter which required competitive examinations and the use of the "Rule of Three" to hire from a rank ordered eligible list of applicants. *Brunet I, supra* at 1250-1253. Eventually, the trial court approved a modified PCT and permitted the City to hire firefighters from an eligible list derived from such tests provided that the City hired male and female applicants in proportion to the number of males and females achieving passing scores.

Both the City and Petitioners appealed the trial court's determination regarding the validity of the examination and the City remained enjoined from using its now valid

examination to hire in rank order pursuant to its charter.

After almost five years of litigation, including one closed appeal to the Sixth Circuit which was dismissed as moot and *certiorari denied*, another appeal and cross-appeal to the Sixth Circuit, a contempt motion in the trial court where a hearing had been held, claims for attorney fees near 1/2 million dollars, claims for back pay and other remedial relief by named plaintiffs, $200,000.00 in employment consultant fees to develop the fire examination and to comply with the trial court's orders, the City's mayor requested that the entire matter be resolved so that the City and its Fire Division could move forward on other issues.

Settlement discussions continued for three months including three status conferences with the trial judge. Eventually a proposed order was generated which the City neither agreed to nor signed - but regarding which the City only agreed not to appeal in the event the court entered such order. The trial court reviewed, signed and filed the proposed order without hearing on February 27, 1989.

In July, 1991 the Intervenors filed an action alleging that the February 27, 1989 order violated the Fourteenth Amendment and 42 U.S.C. § 1983. Two temporary restraining orders were issued by the trial court and both were stayed by the Court of Appeals.

Subsequently, the trial court held an evidentiary hearing and on March 18, 1992 found that ¶12 of the February 27, 1989 order violated the Equal Protection Clause of the Fourteenth Amendment in that the proportional hiring requirement constituted intentional discrimination against male applicants.

The trial court indicated it desired additional evidence on the issue of rank ordering from the PCT scores. Subsequently another evidentiary hearing was conducted on May 21, 1992 and through an order dated July 24, 1992 the District Court found that the firefighter entry level examination was job related, that it fairly and effectively predicted job performance and that it was sufficiently precise to be used to select candidates in order of their scores. (App. 125).

The trial court later issued an order adjusting the seniority of the male firefighters hired pursuant to the 1990 firefighter examination to provide the male applicants with complete relief for the injuries suffered as a result of the discrimination as found by the court.

Petitioners filed appeals from the March 18, 1992; July 24, 1992; and September 23, 1992 orders. The Court of Appeals affirmed the trial court's determinations with the exception that it reversed and remanded on the issue of whether the PCT and CAT should be weighted equally, although the appeals court indicated that the issue may have been addressed in the voluminous record and the court was unable to find it. *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993) (hereinafter *Brunet II*) (App. 91-92 at note 10).

Petitioners have subsequently petitioned this Court for a *writ of certiorari*.

SUMMARY OF THE ARGUMENT

Petitioners present no issues upon which this Court should issue the Writ. While the Court of Appeals correctly required the "strict scrutiny" doctrine in its decision, whether it had applied the "intermediate" standard instead, the court would have reached the same conclusion and correctly affirmed the trial court's decision. Further, the facts revealed that the unintentional discrimination against women had been adequately remedied. Therefore, there was insufficient basis to continue the hiring preference. Lastly, the injury to Intervenors was sufficient to give the Intervenors standing due to the fact that the seniority bestowed upon the Petitioners would not have been the same as the Intervenors but for the gender preference contained in the decree.

I. THE SIXTH CIRCUIT'S USE OF THE STRICT SCRUTINY STANDARD WAS NOT ERROR.

The Petitioners maintain that the Court of Appeal's application of the "strict scrutiny" standard gives rise to a conflict with other circuit decisions and decisions of this Court. However, in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) this Court held that race-based set-aside program established by municipalities are subject to "strict scrutiny"; the purpose of which "...to 'smoke out' illegitimate uses of race....*Id.* at 493. This Court in *Croson* further recognized that "...searching judicial inquiry..." and "...close examination of legislative process..." are to be engaged in "...when reviewing classifications based on race or gender *Id.* at 493, 495 (emphasis added).

This Court also held in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) that:

> "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure it does not conflict with constitutional guarantees." *Id.* at 274 citing *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

The Court of Appeals appropriately relied on *Croson, supra* and *Wygant, supra* to apply the strict scrutiny standard to an affirmative action plan based on a gender classification.

The Court of Appeals also appropriately distinguished between what Petitioners argued to be a "gender conscious plan" which the Court of Appeals determined would be subject to an intermediate standard of review and a "gender preference plan" which required the strict scrutiny standard of review. In this instance, the Court of Appeals properly found that the trial court's decree contained a gender preference and therefore must be subject to strict scrutiny. *Brunet II* (App. 54-55).

While Petitioners argue that this Court's holding in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) requires the intermediate standard to be applied, this Court in that case described the burden to be carried as one of "exceedingly persuasive justification." *Id.* at 724 citing *Kirchberg v. Feenstra*, 450 U.S. 455 (1981). While the distinction between strict scrutiny and intermediate scrutiny standard may be critical in other cases, the factual record in this matter is such that the outcome would have been the same using either standard.

Under either the strict or intermediate scrutiny standard, the question is whether there existed identifiable, actionable discrimination sufficient to justify an otherwise impermissible classification. *See Coral Construction Co. v. King County*, 941 F.2d 910, 931-932 (9th Cir. 1991), *cert. denied* ____ U.S. ____, 112 S.Ct. 875 (1992); *Contractors Ass'n. of Eastern PA v. Philadelphia*, 735 F.Supp. 1274, 1304 (E.D. PA 1990), *vacated on other grounds*, 945 F.2d 1260 (3rd Cir. 1991), subsequent opinion, 6 F.3d 1990 (3rd Cir. 1993). The Sixth Circuit's pre-*Croson* decision in *Michigan Road Builders Ass'n. v. Milliken*, 834 F.2d 583, 595 (6th Cir. 1987), embraced this premise as well. In light of the *Croson* decision and other applicable precedents from this Court any preference must be premised upon continuing or past discrimination left unremedied. This principle is supported not only by the Sixth Circuit's decision here and in *Michigan Road Builders, supra* but also in the Ninth Circuit's *Coral* decision which is relied upon by the Petitioners. As a result there is actually no disagreement between the circuits and therefore this Court should not grant the Writ.

Significantly, the Petitioners fail to address the legitimate exercise of the District Court's discretion in re-examining injunctive orders. In *Rufo v. Inmates of Suffolk County Jail*, ____ U.S. ____, 112 S.Ct. 748 (1992), this Court held that a district court retains discretion in connection with re-examining injunctive orders. In this instance, the trial court recognized and exercised its proper authority. Petitioners failed to address the critical element of the exercise of the district court's discretion under *Rufo, supra* in any of the questions presented.

II. THE FACTS OF THIS CASE DID NOT SUPPORT THE CONTINUATION OF A GENDER PREFERENCE DECREE.

The second question presented by Petitioners relates to whether sufficient facts exist to support the continuation of the proportional hiring requirement. The courts below have determined the continuation of the gender preference contained in the February, 1989 decree was not justified as a remedy for past discrimination based on the facts of this case.

Although the City disagreed with the District Court's findings that the City's conduct constituted intentional discrimination, the Court of Appeals affirmed the district court's holding on this issue.

Petitioners however, go too far in zealously presenting their case when they assert that "... as of the date of the consent decree, ranking on the firefighter test was discriminatory" petition at 23 and 15, note 7. While there is no question that in February, 1989 the district court had not yet approved the use of the City's new firefighter examination for rank order hiring, that does not mean that the test necessarily was "discriminatory."

The Court of Appeals recognized that evidence based on the 1987 Landy study demonstrated that "... a higher score on the PCT is likely to result in better job performance and that therefore the test results could be used to select new firefighters in order of their PCT scores." *Brunet II* at 396; App. 20. There is no evidence in the record to support petitioner's allegation that rank ordering on the firefighter test discriminated against women when the February, 1989 decree was entered.

The facts of record in this matter furnish no valid reason to grant the Writ.

III. INTERVENORS' INJURY WAS SUFFICIENT TO CONFER STANDING.

In short, Petitioners argued that Intervenors did not demonstrate sufficient injury for the purposes of standing. Petitioners charge that there is no evidence in the record of injury to the Intervenors. However, it is clear that the women hired in August, 1991 achieved a higher level of seniority than they would otherwise have in the absence of the decree. The court of appeals effectively and succinctly explained the harm:

> Fox and Sachs would be less senior than Tudor or Meyer and Hilleary if not for the consent decree. Hiring Fox and Sachs, whose test scores were lower than those of any of the *Tucker* plaintiffs, diminished the employment status of Tudor, Meyer and Hilleary. This is because Fox and Sach enjoy the same "competitive status" seniority right as Tudor and Meyer, and greater rights than Hilleary. Tudor and Meyer have lost the advantage of having more seniority points than the women in future competition for promotion. They are harmed by having to compete on equal footing with persons who do not belong in their class. Hilleary has not only lost that advantage, but has been put at a disadvantage because he is less senior than Fox and Sachs. Moreover, when the City expanded the class from 36 to 38 Tudor and Meyer were put in the position of having to compete with two additional persons, and

Hilleary, who was hired in the next class was junior to two more people than he would have been in the absence of the consent decree. *Brunet II* at 401; App. 43, 44.

Petitioners simply disagree that there is sufficient injury. They fail to demonstrate that the Court of Appeals holding in this regard is in conflict with other Circuit decisions or Supreme Court decisions. Therefore, Petitioners have failed to demonstrate a basis for granting the Writ.

CONCLUSION

For the foregoing reasons, Respondents respectfully urge this Court to deny the Petition.

Respectfully submitted,

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